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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-400

CONSTANTINE BALLAS, as President of Lodge 1894, International Association of Machinists & Aerospace Workers, AFL-CIO,

Petitioner,

vs.

MATTHEW McKIERNAN, JOHN P. CARROLL, and JOSE ANTONIO COLON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Question Presented for Review

Is an individual's right to advocate a change in collective bargaining representative and to participate openly in the procedures for such change protected by the Railway Labor Act and the Freedom of Speech provisions of the Labor Management Reporting and Disclosure Act, against punitive fines by the incumbent union of which he is a member pursuant to contractual union shop provisions?

Statement of the Case

It is agreed that the three individual Respondent aircraft mechanics engaged in an effort to displace the Petitioner, International Association of Machinists (IAM), as the bargaining representative. Their activities were open and public, consisting of discussion, advocacy and the circulation of printed material. An election was called by the National Mediation Board in accordance with the procedures of the Railway Labor Act. During the pendency of the election campaign the three mechanics continued their open support of the rival union (Aircraft Mechanics Fraternal Association—AMFA) and one of the three was designated as a "poll-watcher" or "runner" for AMFA by the NMB. The three men were fined a total of $7,000 ($3,000-$3,000-$1,000) for *these activities* on the grounds that they constituted "dual unionism" within the meaning of the IAM Constitution.*

At the time of the events described above and in the petition, the individuals were employed by an carriers under contract with the IAM. Those contracts contained union shop provisions which required IAM membership as a condition of continued employment.

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* Section 3 of Article L of the IAM Constitution provides in pertinent part:

> "The following actions or omissions shall constitute misconduct by a member which shall warrant a reprimand, fine, suspension and/or expulsion from membership * * *.
>
> "Attempting, inaugurating or encouraging succession from the IAM or advocating or encouraging or attempting to inaugurate any dual labor movement * * *."

It is undisputed that Respondents understood or were given to understand that they must join the IAM or lose their jobs. No affirmative action was taken by either the union or the Employer to advise Employees that any alternative course was available. There was no provision in the union constitution or by-laws indicating how an individual might resign and preserve his job. In short, Respondents understood that so long as the IAM was their designated union, they were required to be members in order to continue their employment.

On charges brought by "plaintiffs" who were, themselves, union officials, "trial" proceedings were conducted within the union, resulting in fines totalling $7,000. The union members, in the case of McKiernan and Carroll, voted to affirm the conviction and then voted to suspend the fines. Thereafter, in violation of the union's constitution,* the union officials, including international representatives, lectured the membership, and they voted to affirm Color's guilt and the imposition of a fine. The decision of the union members to suspend the fines was appealed by the union to its own International President *without notice* to the Respondents. It was an *ex parte* proceeding relying upon a transcript of the union's hearing which Petitioner knew that Respondents did not have.

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* Article L, Section 12(1) states in pertinent part:

"After the trial committee has made the necessary explanation of its intent and meaning, the trial committee's verdict with respect to guilt or innocence of the defendant shall be made without debate to a vote by secret ballot of the members of the LL (Local Lodge) in attendance."

While these and other due process points are not before the Court on this Petition since they were not reached by the Court below, the Petitioner's Statement of the Case should not be permitted to convey the impression that we are dealing with anything but the attempt of a massive international union to crush dissent by *all* means available to it—including the prolongation of this very litigation.

POINT I

This Court should deny the Petition for Certiorari, as the decision of the Court of Appeals is consistent with established national labor policy as embodied in the decisions of the Supreme Court.

The New York Court of Appeals relied on Federal statutory policy to set aside the punitive fines levied against the individual Respondents. The Court held:

> "* * * that by constitutional provision the union may not in the guise of an asserted contractual restriction foreclose the individual members from the exercise of their legitimate right to freedom of choice of their bargaining agent. If the relationship between the union and its members be recognized as including in addition to contractual rights, substantial fiduciary obligations on the part of the union to its members (Bradley v. O'Hare, 11 A.D. 2d 15), the fiduciary may not advance its self-interest at the expense of the rights of the union members to whom its fiduciary responsibility runs." *Ballas* v. *McKiernan,* 35 N.Y. 2d 14, 20 (1974).

A line of distinction has emerged from the decisions of this Court, the National Labor Relations Board and other

Federal Courts, which emphasizes the distinction between an individual's obligations to subordinate his personal views in favor of the collective strength of the bargaining agent *vis-a-vis management* and an individual's continuing right to control the choice of his bargaining agent and to utilize statutory procedures designed for his own personal protection.

In *NLRB* v. *Allis-Chalmers*, 388 U.S. 175 (1967), this Court (four Justices dissenting, one concurring) relied upon the proviso to Section 8(b)(1)(A) of the National Labor Relations Act* in reaching its decision that a suit to collect a union fine against members who cross a picket line during a strike was not an unfair labor practice by the union. The Court recognized that the power of a union to discipline its members is "particularly vital when the members engage in strikes." 388 U.S. at 181. This case did not suggest a direct legitimization of disciplinary fines, but, on the contrary, stated that the seriousness of strike-

* National Labor Relations Act, 29 U.S.C. §158(b)(1)(A) (1964). The specific language of Section 8(b)(1)(A) states:

> "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title."

National Labor Relations Act, 29 U.S.C. §157 (1964) provides:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this title."

breaking was such as to nullify the union's principal weapon and destroy the economic objective for which the union exists. Thus, the Court permitted the fines while acknowledging the individual's rights under Section 7 of the National Labor Relations Act* to refrain from collective economic action. Similarly, in *Scofield* v. *NLRB,* 394 U.S. 423 (1969), the union had adopted a rule setting certain production ceilings and the Court considered whether it was an unfair labor practice for the union to penalize an individual who had exceeded those standards. As in *Allis-Chalmers,* the Court held that this was protected by the union's right to control its internal affairs. It should, however, be noted that the NLRB has limited *Scofield* to those situations where the union has bargained for the production ceiling. *New York District Council No. 9, International Brotherhood of Painters and Allied Trades* v. *NLRB,* 453 F.2d 783 (2d Cir. 1971).

In both *Scofield* and *Allis-Chalmers* the union's objective was tied to the establishment or protection of working conditions for the represented group. However, neither case raised an issue of the individual employee's right to protection against invidious action directed against him by the union, nor was there an issue affecting the member's right to change his representative.

In *NLRB* v. *Marine Shipbuilding Workers,* 391 U.S. 418 (1968), the Court confirmed the distinction made in *Allis-Chalmers* and *Scofield* between those rights which are superior to membership obligations, and those which must be surrendered in the interest of the collective strength of

* See footnote on page 5 of text.

the unionized group. In this case, the Court overturned the union's attempt to discipline a member for filing an unfair labor practice charge against it. The Court clearly stated that an individual, regardless of his membership status, was not to be deprived of those protections afforded him by Congress. The Circuit Courts and the NLRB have uniformly followed the *Marine Shipbuilding* rationale by protecting individuals against union fines for utilization of those statutory procedures relating to choice of representative. In *American Hospital Supply Corp.*, 207 N.L.R.B. No. 127, 84 LRRM 1601 (1973), the Board held, 84 LRRM at 1604:

> "Realistically, both deauthorization and decertification petition[s] represent serious threats to a union. The decertification petition if successful eliminates the union as the collective bargaining representative. The deauthorization petition if successful does not relieve the incumbent Union from its obligation to act as collective bargaining agent, but, it allows employees to work in the appropriate unit without joining the union or paying dues. Thus, the deauthorization petition can deprive the union of necessary income to administer properly the contract while at the same time the union still has its legal obligation to represent all of the employees in the unit. We therefore see no reason to depart from the rationale of *Blackhawk Tanning, supra*, and its progeny in a deauthorization situation. Accordingly, *we conclude that Respondent Union violated Section 8(b)(1)(A) of the Act for fining Vincent for his deauthorization activities because the effect is not defensive and can only be punitive-to discourage members from seeking access to the Board's processes.*" (Emphasis added.)

For other cases in which fines have been held illegal, see *e.g., Teamsters Local 165 (Goodyear Tire & Rubber Co.)*,

211 N.L.R.B. No. 100 (1974) (Fine for sponsoring and participating in deauthorization election); *Boot & Shoe Workers (United States Shoe Corp.)*, 208 N.L.R.B. No. 64 (1974) (Fine for soliciting fellow employees to sign rival authorization cards); *Electrical Workers, IBEW, Local 34 (Protection Alarms, Inc.)*, 208 N.L.R.B. No. 91 (1974) (Fine for filing unfair labor practice charge); *District Lodge No. 837, IAM (McDonnell Douglas Corporation)*, 206 N.L.R.B. No. 79 (1973) (Fine for soliciting signatures on rival union cards); *Lodge 113, IAM (American Hospital Supply Corp.)*, 207 N.L.R.B. No. 127 (1973) (Fine for activities in support of union-shop deauthorization petition); *Textile Workers Union of America (Visnet Mill, Bemis Co., Inc.)*, 189 N.L.R.B. 598 (1971) (Fine for soliciting other employees to sign rival union authorization cards); *Lodge 66, IAM (Smith-Lee Co.)*, 182 N.L.R.B. 849 (1970) (Fine for circulating decertification petition).

The decisional developments in the law have not left this union with its hundreds of thousands of members defenseless in protecting its monolith. The *Sawyers* case* cited by the Petitioner demonstrates precisely the accommodation which has been made between union solidarity and individual freedom. There the Court held that an employee whose actions are inconsistent with the union's policies can be expelled—eliminated from the body politic under appropriate circumstances. Thus, the union may preserve its own integrity.**

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* *Sawyers* v. *Grand Lodge International Association of Machinists*, 279 F.Supp. 747 (E.D. Mo. 1967).

** *Tawas Tube Products, Inc. and Harold Lohr and U. S. Steelworkers*, 151 N.L.R.B. 46 (1965); *NLRB* v. *International Molders and Allied Workers Union, Local 125 (Blackhawk Tanning Co., Inc.)*, 178 N.L.R.B. 208, enforced 442 F.2d 92 (7th Cir. 1971); *Richard Price* v. *NLRB*, 373 F.2d 443 (9th Cir. 1967), cert. den., 392 U.S. 904.

Consider the effect upon the statutory guarantees of free association and the procedures for promoting it of the $7,000* in fines in this case. The calculated effect was to prevent *any* challenge to the union's position and thereby to *nullify* those procedures. The suggestion by the union that its statutory permission for a union shop contract swallows up the employee's right to change his representative is the same argument that was made and rejected in *Marine Shipbuilding* in reliance upon the union shop and 8(b)(1)(B) proviso in the NLRA. The argument comes with particular ill grace from the union which in this case is relying on a contract clause and a constitution which actively misled the covered employees as to their right to limit their membership.

Petitioner has also misperceived both the relevance and applicability of the NLRA with respect to this case. While it is true that the Railway Labor Act is different from the NLRA in enforcement procedures, both statutes clearly guarantee employee rights of self-determination. Specifically, the NLRA, Section 8(b)(1)(A) makes it an unfair labor practice "to restrain or coerce Employees in the exercise of their Section 7 rights of self-determination." The Railway Labor Act's General Purposes, Sec. 2 states:

> "The purposes of the Act are * * * (2) to forbid any limitation upon freedom of association among employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization."**

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* Note the fines were levied in 1968 at a higher valued dollar.

** U. S. Code, 45 U.S.C. Section 152.

The amendment to the Act, which permitted the union shop agreement, §152, subd. eleventh (c) states in pertinent part:

> "The requirement of membership in a labor organization (a) * * * shall be satisfied * * * if said employee shall hold or acquire membership in any one of the labor organizations national in scope, organized in accordance with this Act * * *
>
> * * *
>
> "*Provided, further* that nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another * * *."

The effect of permitting the coercive union fines levied in this case would not only be contrary to organizational rights under Section 2 of the Railway Labor Act but would also nullify the proviso to the union shop provision which the union itself relies upon.

Time and again, the Courts have given great weight to NLRA cases dealing with situations parallel to the one at issue under the Railway Labor Act. As the Court stated in *Pan American Airways* v. *International Brotherhood of Teamsters*, 275 F.Supp. 986, 997-98 (S.D.N.Y. 1967), aff'd 404 F.2d 938 (2nd Cir. 1969):

> "[Cases under the Railway Labor Act] offer a cogent analogy in the solution of similar problems arising under the Railway Labor Act and the courts have frequently drawn on NLRA cases for guidance. See *e.g., Ruby* v. *American Airlines, Inc.*, 323 F.2d 248 (2nd Cir. 1963), cert. den. 376 U.S. 913, 84 S.Ct. 658 (1964); *Flight Engineers' International Ass'n* v. *Eastern Airlines, Inc.*, 208 F.Supp. 182 (S.D.N.Y. 1962); *American*

Airlines, Inc. v. *Air Line Pilots Ass'n, Int'l*, 169 F. Supp. 777 (S.D.N.Y. 1958)."*

The pertinence of these NLRA cases is illustrated by the decisions interpreting and applying the doctrine of a union's duty of fair representation. That doctrine—which requires that unions treat the employees which they represent fairly and without hostile discrimination—was first articulated in cases arising under the Railway Labor Act See, generally, *Steele* v. *Louisville and Nashville Railroad Company*, 323 U.S. 192 (1944); *Oliphant* v. *Brotherhood of Locomotive Firemen and Enginemen*, 262 F. 2d 359 (6th Cir. 1958); and it has since been applied in full in many cases arising under the National Labor Relations Act. See, *e.g.*, *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1955); *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Humphrey* v. *Moore*, 375 U.S. 334 (1964). Thus, in the area of the law that the instant case involves—namely, protection of the rights of individual union members—the cases under the NLRA, draw their very decisional basis from the RLA.

POINT II

The Court of Appeals properly relied on the *Loudermilk* case.

The New York Court of Appeals followed established Federal law** in holding that the fines sought by the union were unenforceable because they violated the freedom

* See, also, *Carpenters Local 22 (Graziano Construction Company)*, 195 N.L.R.B. 5 (1972) in which the Board referred to the LMRDA in striking down a fine, relying on *Scofield's* mandate to the Board to consider the full panoply of congressional labor policies in determining the legality of union fine.

** *Airline Maintenance Lodge 702, IAM* v. *Loudermilk*, 444 F.2d 719 (5th Cir. 1971).

of speech provisions under Section 101(a)(2) of the Labor Management Reporting and Disclosure Act (Landrum-Griffin Act), 29 U.S.C. Section 411(a)(2). That section of the "Bill of Rights" of members of labor organizations provides for freedom of speech and assembly to *all* members of labor organizations. Under this provision, union members are free to express "any views, arguments or opinions." This expression is subject to two limitations: the right to enforce reasonable rules as to the responsibility of members toward the organization as an institution; and the right to enforce reasonable rules requiring members to refrain from conduct that would interfere with the union's performance of its legal or contractual obligations.

The facts of the *Loudermilk* case are virtually identical to those at bar, even to the fact that the IAM was the incumbent union seeking to forestall a change of representation to AMFA among a group of air line employees. In *Loudermilk* the Fifth Circuit found that the Respondent's "dual unionist" activities of seeking a change in representation through statutory procedures were protected free speech under the "Bill of Rights" when balanced against the union's right to make "reasonable rules," where he had been compelled to join the union under a union shop agreement. For reasons best known to itself, the IAM did not seek review of the Fifth Circuit's decision. That decision then became the established law on this issue and has now been followed by three successive appellate decisions in the Courts of New York.

In its decision on this case, the New York Court of Appeals specifically recognized the correctness of the *Louder-*

milk holding that "the imposition of a fine on a union member for joining and supporting another union was an invalid infringement on the rights of the union member under the provision of the Labor Management Reporting and Disclosure Act." 35 N.Y. 2d 14, 21. The Court then went on to formulate its conclusion based on this principle and stated that "support of a rival union is a legitimate expression of member dissatisfaction with an incumbent collective representative, and involves the exercise of a right of the individual member which cannot be denied by the union * * *." 35 N.Y.2d 14, 21.

Appellant argues at length that Title I of the LMRDA, known as the "Bill of Rights," guarantees members freedom of speech only *within* the confines of the organization and its rules. On the contrary, free speech is guaranteed inside or outside a union meeting subject to the union's right to adopt and enforce *reasonable* rules as to the responsibility of every member toward the union as an institution.* The key question of course is what constitutes a "reasonable" rule when the preferred right of freedom of speech and association, guaranteed by the Federal and State Constitutions as well as the Landrum-Griffin Act, is at stake. Petitioner cites a number of cases in which courts have upheld union rules *none* of which involved an employee's right to choose his own bargaining representative. Petitioner also stresses the fact that an individual has no right to insist upon change when it is contrary to the will of the majority. But as the Fifth Circuit in

* It should be pointed out that every case Petitioner cites in support of its argument against union democracy within the union *antedates* the passage of the Landrum-Griffin Act in 1959 (Petitioner's Brief at 13-16).

Loudermilk and the New York Court of Appeals in this case both pointed out, where membership is involuntary there can no longer be any question of majority will. Furthermore, there are no cases which hold that this kind of right of access to Board processes by an individual can ever be waived by the vote of a presumed majority of union members.

The Fifth Circuit's opinion, quoted with approval by the New York Court of Appeals, represents a careful balancing of interests in determining what is a reasonable rule in a factual situation identical to Respondent's. The Court's opinion concluded that *Loudermilk's "dual unionist"* activities were protected free speech when balanced against the union's right to make "reasonable rules" where he had been compelled to join the union under a union shop agreement. Union shop provisions are, as a practical matter, by their very nature sufficiently coercive to preclude a finding that employees have waived their fundamental rights to select and change bargaining representatives. Indeed, there is no basis to believe that Congress intended that waiver of individual rights to select and change representatives be permitted under any circumstances; while outlawing "yellow dog" contracts for the benefit of management, the Legislature certainly did not intend to weld individual workers to any particular union. Nor did Congress intend that private and unequal agreements should supersede its own design for the representation of employees and the procedures for effecting that representation.

Conclusion

For the foregoing reasons we respectfully submit that the decision of the New York State Court of Appeals should not be disturbed and that it would be inappropriate to grant the instant petition for certiorari.

Respectfully submitted,

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